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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 67

NASHVILLE MILK COMPANY,
Petitioner,

vs.

CARNATION COMPANY,
Respondent.

REPLY BRIEF OF NASHVILLE MILK COMPANY, PETITIONER.

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PETITIONER'S REPLY BRIEF.

Respondent's brief is silent as to the primary supporting arguments advanced in our brief. We argued that it is clear from the Robinson-Patman Act that the act in its entirety amended the Clayton Act (Br. 15-19). In support of that argument, we pointed out that Sec. 2 of the Robinson-Patman Act used the term "this amendatory act" four times when referring to that act, thus characterizing the *entire act* as being amendatory in nature (Br. 16). We pointed out further evidence in support of our argument is to be found in the fact that Secs. 2 and 4 are not contained in quotation marks as is Sec. 1, yet those sections clearly became a part of the Clayton Act by amendment (Br. 16). This evidence clearly shows that Congress intended all sections of the Robinson-Patman Act to amend the Clayton Act. Respondent has not uttered a syllable in its brief in reply to these two supporting arguments.

I.

Reply to Division I.

Whether Sec. 3 of the Robinson-Patman Act amended and became a part of the Clayton Act is to be determined by the intention of Congress. This intention may be determined from the internal evidence furnished by the act itself and also the external evidence consisting of its history in Congress. We argued fully in our brief that both the internal and external evidence establish that Congress intended that Sec. 3 should become a part of the Clayton Act.

Respondent's reference in its brief to other anti-trust laws that did not pretend to amend the Clayton Act or that did not give a civil suit for treble damages because of their violation is therefore irrelevant. The issue is what Congress intended here.

Respondent states that a bill was introduced in the 84th Congress (S. 3516) to amend Sec. 1 of the Clayton Act to include Sec. 3 of the Robinson-Patman Act as one of the anti-trust laws but it failed to pass. The bill was introduced by Senator Humphrey. In explaining the bill, Senator Humphrey stated its purpose was to provide that officers and directors of a corporation authorizing acts "which constitute criminal violations of the anti-trust laws" should be liable to forfeit to the United States in an amount twice their compensation covering the period when such violations occurred. The forfeiture was to be recovered in a civil action brought by the United States (102 Cong. Rec. 5404). Manifestly the introduction of such a bill is irrelevant to the issue here.

II.

Reply to Division II-A.

Respondent states that the *Vance* case (*Vance v. Safeway Stores, Inc.*, 239 F(2) 144) held that all four sections of the Robinson-Patman Act comprise the text of an amendment to "Section 2 of the Clayton Act". We do not so read that case. It did not single out Sec. 2 of the Clayton Act and hold that Secs. 2, 3 and 4 of the Robinson-Patman Act became a part of that section of the Clayton Act by amendment. Neither do we take such a position.

What the *Vance* case did hold, as reasonably interpreted, and what we contend, is that Sec. 1 of the Robinson-Patman Act amended Sec. 2 of the Clayton Act; and that Secs. 2, 3 and 4 of the Robinson-Patman Act comprise additional matter added to the Clayton Act by way of amendment. Nothing said by us in our brief repudiates or is in any way inconsistent with the opinion of the Court of Appeals in the *Vance* case.

Respondent asks if we "suggest" that Secs. 2, 3 and 4 were intended to be added to the Clayton Act. Evidently respondent did not fully comprehend our argument. We not only "suggested" but we argued fully in our brief (pp. 16-19) that all sections of the Robinson-Patman Act amended and became a part of the Clayton Act; and that "all" sections of the Robinson-Patman Act are integrated and inter-related parts of the whole".

Respondent shows a strange silence as to our argument that although quotation marks did not appear enclosing Secs. 2 and 4 of the Robinson-Patman Act, the former (dealing with pending actions) and the latter (exempting co-operatives) clearly amended the Clayton Act. If the absence of quotation marks from those sections would not exclude them as amendatory of the Clayton Act, the absence

of quotation marks from Sec. 3 would therefore not exclude it as amendatory of the Clayton Act. Respondent does not make even the pretense of an answer to that argument.

Respondent states that when Congress adds to an existing act it says so by expressly referring to the inserting of new matter. In support of this it refers to the manner in which the Clayton Act was amended in 1955. But respondent does not deny that there may be, as here, an implied amendment. It does not follow that because in 1955 Congress made an express amendment to the Clayton Act by the addition of two new sections, Congress has set an irrevocable patter as to how the Clayton Act is to be amended. Neither does it exclude the power or intention of Congress to have ever added sections to the Clayton Act by implication.

Respondent does not deny that the first two clauses of Sec. 3, dealing with discriminatory prices, are akin to Sec. 2 of the Clayton Act. But respondent states that the third clause is "more closely related" to the Sherman Act. From this respondent seems to imply that it cannot be said whether Sec. 3 amends the Clayton Act or the Sherman Act. Whatever may be the validity of respondent's position that the third clause is more closely related to the Sherman Act, respondent's implication would only be good if Sec. 3 had been adopted by Congress in a bill of its own independent of Secs. 1, 2 and 4. Here it is adopted in a bill with three other sections all of which we have shown are inter-related; three of which without doubt amend the Clayton Act; and one of which characterizes the act four times as "this amendatory act".

Respondent argues that Sec. 3 is a separate enactment of its own having nothing to do with the Clayton Act because of the criminal prevision for its violation. The purpose of the criminal provision is shown in the remarks of Senator

Borah, one of the sponsors of the Borah-Van Nuys amendment. His remarks are reproduced in Appendix III of our brief, pp. 34-35. He stated that "My view is that there are certain practices so obviously improper and unjust that they ought to be prohibited by specific provision of law, and that indulging in them ought to constitute a crime". Shortly after that statement the following colloquy occurred:

> Mr. Logan. Mr. President, may I interrupt the Senator to ask whether it is unusual to provide for violation of a statute, a criminal prosecution and also a right to sue for damages? The two are not inconsistent.
>
> Mr. Borah: No; we have such a provision in the Sherman anti-trust law.

It is perfectly obvious that merely because Congress chose to make a violation of Sec. 3 alone subject to criminal penalties without annexing criminal penalties for the violation of other sections of the Clayton Act, it would not necessarily follow that the presence of the criminal provision in Sec. 3 would negate that it became part of the Clayton Act, especially where it is otherwise as here clear that Congress intended that Sec. 3 should become a part of the Clayton Act.

Reply to II-B.

At p. 20 of its brief respondent has drawn out of context a remark of Representative Miller, one of the House Conferees. The discussion that led up to the remark is reproduced in full in Appendix B of our brief at pp. 37-38. Representative Miller explained that Sec. 3 "is the Borah-Van Nuys amendment, and that is the criminal section of this bill. The first part of this bill has nothing to do with criminal offenses. It deals primarily, in my opinion, with the authority of the Federal Trade Commission to regulate and enforce the provisions of Sec. 2 of the Clayton

Act as amended. Sec. 3 of the bill is placed in an effort to make the criminal offense apply to that particular section, and I believe that is a reasonable construction if you will look at the bill". After a question by Representative Massingale, the following appears:

> Mr. Hancock of New York: Is it not perfectly clear that any vendor who discriminates in price between purchasers *is guilty of a crime and is also subject to triple damages to anyone who claims to be aggrieved?* (Italics added.)
>
> Mr. Miller: *That is true,* but the criminal part is included in section 3 and section 3 only. (Italics added.)
>
> Mr. Hancock of New York: *But it is part of the same act?* (Italics added.)
>
> Mr. Miller: *Of course it is,* but it is not part of the Clayton Act as amended by section 2. (Italics added.)

It is the last remark that respondent has quoted in its brief out of context. It is clear when considered in context that Representative Miller intended to convey the thought that the criminal provision of Sec. 3 was limited to that section alone and *did not otherwise extend into that part of the Clayton Act which was amended by Section 2.* To conclude that he intended to convey the thought that only Sec. 2 amended the Clayton Act would distort the plain meaning of his remarks.

Respondent calls attention to the fact that the Borah-Van Nuys amendment was included as a sub-section in the House bill after its Senate amendment; but that it became a separate section (3) in the bill as re-written by the Conference Committee. This does not have the significance respondent has given to it. Representative Miller's statement, just quoted, that "Section 3 of the bill is placed in an effort to make the criminal offense apply to that section" clearly shows the purpose of having the contents of Sec. 3 so placed in a separate section of the bill. It

was to make it clear that the criminal penalties for its violation would apply to that section alone and not to any other part of the bill.

Another consideration removes the significance to which respondent attaches to the content of Section 3 so appearing detached from Sec. 1 of the bill. What is Sec. 4 (the co-operative provision) had been in the section containing the Borah-Van Nuys amendment that passed the Senate. The Conferees detached it from the Borah-Van Nuys amendment of the Senate bill and, with a slight amendment, incorporated it as Sec. 4 of the bill (See Conference Committee Report, 80 Cong. Rec. 9415). We argued in our brief, without challenge from respondent's brief, that Sec. 4 amended and became part of the Clayton Act. It could hardly be concluded that the detachment of what became Sec. 4 from the Borah-Van Nuys amendment establishes that the Conferees did not intend Sec. 4 to amend and become a part of the Clayton Act any more than a similar conclusion as to Sec. 3 because of its detachment.

Respondent contends (Br. 19-20) that the language of the Conference Committee report excludes Sec. 3 as an amendment of the Clayton Act. This contention was relied upon by the Court of Appeals and was fully argued to the contrary in our brief (pp. 14-15). Respondent has made no answer to our argument.

At p. 21 of its brief respondent quotes a portion of Representative Celler's remarks but significantly failed to quote the following remarks appearing on the preceding page of the Congressional Record (p. 9420) which are set forth in Appendix B of our brief (pp. 36-37):

> Mr. Celler: If he violates the Borah-Van Nuys provision of the bill he is subject to penalties of a criminal nature and has committed an offense.

Mr. Hancock of New York: *And would he also be liable for triple damages?* (Italics supplied.)

Mr. Celler: *And he would also have to respond in triple damages under the provisions of the Clayton Act. Anyone aggrieved can sue.* (Italics supplied.)

It is also significant that respondent has no comment to make about other remarks by Representative Celler and by Representative Miller set forth in Appendix B of our brief (p. 39) which plainly show that those two members of the Conference Committee considered that they had participated in the preparation of a bill under which a civil suit for damages would accrue to a party injured by a violation of Sec. 3.

Conclusion.

The balance of respondent's brief has been already covered in our brief and we consider no reply is required.

Respectfully submitted,

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